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THE "ACT OF STATE" DOCTRINE

The field of international law in general is sharply demarked from that of municipal law, but it is the individuals, composing the population of the various states and nations, who furnish the points of contact where international friction may be generated. With the claims of a citizen or subject against his own government, and its officers and agencies, international law naturally has nothing to do. But when an individual asserts a claim against a government not his own, or against the individuals who carry on its operations, such a claim falls on one side or the other of the boundary between international law and municipal law, according to whether the claimant has or has not an adequate remedy in the ordinary courts of the state against which the claim exists. If he has, it is unusual for his own nation to take any cognizance of the matter at all. If he has not, it is then for his own nation to determine whether to make the cause of the individual the cause of the nation. If it so determine, the boundary line is crossed, and the individual grievance becomes a matter of international adjustment and discussion, which may extend even to the arbitrament of war. In this way, what is really a mere cause of action may become a *casus belli*.

One of the most notable results of increasing civilization has been the ever-growing recognition of the rights of the stranger. The more completely such rights are recognized and vindicated by the internal authorities and tribunals, the less occasion there is for resort to external diplomatic pressure, and the less danger there is of international friction.

Thus the development of municipal law upon this subject has an important bearing upon international law. The phase of this development now to be discussed is the so-called "Act of State" doctrine, particularly as exemplified by certain decisions of the courts of England and the United States.

This doctrine may be briefly and baldly stated as follows: An act, which would otherwise be an actionable wrong, may be so

authorized or adopted by a government as to make it an "Act of State" for which no individual is personally liable, and for which the government can be made responsible only through its own grace or through international recourse. The broader the application of this doctrine becomes, the more cases there will be in which an individual with a real or fancied grievance will find himself unable to secure a judicial determination of the justice of his claim, and thus the larger will be the possible field of international dispute.

Practically all civilized nations provide some method by which claims of a contractual nature against their governments may be presented for determination by a judicial tribunal. Where this remedy is extended to foreigners, as it usually is, and where the tribunal is an independent court of justice, free from executive domination, there is nothing for international cognizance, even if error be committed or injustice done in a particular case. But where the claim "sounds in tort," there is usually no recourse against the government in its own courts, and the only remedy is against the individual officer who performed or directed the act complained of, leaving to his government the duty to indemnify him in a proper case through extra-judicial channels. This course is somewhat circuitous, and imposes upon a successful claimant the risk of losing the fruits of his victory if the nominal defendant is execution-proof and the government does not see fit to provide an indemnity for the claimant's benefit. In the long run, however, it probably works out as near an approach to substantial justice as any other legal machinery. The theory is apparently this: the king — or the state — can do no wrong, but the individual officers who administer the government may and not infrequently do. When they do so, they are responsible to the person injured, but if their acts were done in good faith in the service of the state, the state will make good the loss of its servants. So far so good; but here sometimes comes in, as an obstacle to justice, the "Act of State" doctrine, to relieve the individual without subjecting the government to any liability except in the international forum.

In English jurisprudence, this doctrine seems to have been very broadly asserted at one time by zealous Crown lawyers, and accepted

by subservient courts, even to the point of allowing a plea that the matters in controversy constituted an "Act of State" to oust the jurisdiction of the ordinary courts altogether.¹ But as the courts gradually established their independence of the executive, the doctrine received further and further limitations, until the earlier claims of complete exemption were given up and may be disregarded for the purposes of this discussion, which is intended to treat of certain present aspects of the doctrine, rather than of its historical development in detail.

One of the leading cases is *Buron v. Denman*, reported in 2 Exchequer, 166. The defendant in this case, Commander Denman of the British Navy, was carrying on a campaign against the African slave trade. In its course he burned plaintiff's slave barracoons at Gallinas on the West Coast of Africa, and liberated a large number of slaves. Gallinas was situated in territory under native control, where, "according to the evidence on both sides, it was lawful to possess slaves." Plaintiff, a subject of Spain, brought an action in trespass in the English courts. The defendant pleaded that his acts had been ratified and approved by the Admiralty, and thus adopted as an "Act of State" for which he was not personally liable. The case was tried before Baron Parke, who held that the acts complained of in themselves constituted a tort, but left it to the jury to determine the question of governmental ratification, pointing out that by such ratification

the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is) and actually exempts from all liability the person who commits the trespass.

The essence of this decision is well indicated by Professor Dicey in his masterly work on the English Constitution, where he says:

What the judgment in *Buron v. Denman* shows is, that an act done by an English military or naval officer in a foreign country to a foreigner, in discharge of orders received from the Crown, may be an act of war, but does not constitute any breach of law for which an action can be brought against the officer in an English Court.²

¹ See W. Harrison Moore's "Act of State in English Law," pp. 4-31.

² Law of the Constitution, 7th ed., p. 362, note 3.

This goes to the root of the matter. Where an "Act of State" injures an individual foreigner, it passes from the domain of law to the domain of force and becomes an act of war waged by a government against an individual, with somewhat overwhelming odds in the government's favor, and with no redress for the injured party even in his own courts.³ In the *Denman* case the facts may have justified the use of such methods. The British Government was carrying on what amounted to a war, not against a nation, but against an institution — slavery — which advancing civilization was sloughing off; and judicial opinion, reflecting as it always must to some extent general public opinion, gave its sanction to war measures.

Subsequent decisions by the English courts show that they have recognized the necessity of setting strict limits to this dangerous doctrine. They have accordingly held that whether or not an act done under color of office is an "Act of State" is a justiciable question, within the jurisdiction of the civil courts,⁴ and that even authorization by the Crown is no defense unless the Crown is acting within its constitutional rights.⁵

Parliamentary authorization stands on a different basis, in view of the supreme power of the British legislature, but this distinction does not apply in countries where the legislature as well as the executive is subject to constitutional limitations. The recent English cases do not squarely present the question whether an alien claimant is entitled to the same enforcement of law and measure of justice as a British subject, and it may be that the somewhat chauvinistic rule of the *Denman* case still holds. It hardly seems probable, however, that it would be applied except in a case where the controversy involved some question which was regarded as a "moral issue," like the suppression of the slave trade.

In the United States the question arose at an early stage of the nation's history, and was determined by such jurists as Marshall and Story in favor of the view that if an act was otherwise a trespass

³ *Underhill v. Hernandez*, 168 U. S. 250.

⁴ *Musgrave v. Pulido*, L. R. 5 App. Cases, Privy Council, 102.

⁵ *Walker v. Baird*, L. R. 1892 App. Cases, Privy Council, 491.

upon private rights, it could not be legalized by governmental authorization, whether from an executive department, from the President, or from the legislature acting beyond its constitutional powers.⁶ Moreover the courts adhered to the salutary principle long ago formulated by the Latin poet:

Tros Tyriusque nihi nullo discrimine agetur:

and the rights of aliens were as fully vindicated as those of citizens.⁷ Without formulating the idea in so many words, the courts apparently recognized that it was unworthy of the government to wage private war upon a defenseless individual, whether citizen or alien, and that in a state of peace a government officer could not escape the consequences of trespassing upon private rights by sheltering himself under the *ægis* of a so-called "Act of State." Thus the "Act of State" doctrine, as understood in England, found no lodgment in the structure of American jurisprudence, at least while its early builders were laying its foundations. They recognized that the government was not a self-existent or divinely anointed entity with inherent and irresponsible powers, but was itself the creature and subject of Law, the organized structure of the community, acting through individuals, each and every one of whom was bound not to violate the law to the injury of another, on peril of his individual responsibility.

After the Spanish War the "Act of State" doctrine seems to have reappeared, and was stated in a surprisingly broad form by Mr. Justice Holmes in the *Paquete Habana*,⁸ as follows:

But we are not aware that it is disputed that when the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued.

As applied to unquestionable acts of war, affecting persons or property having an "enemy" character, this is doubtless the only practicable rule, but to give it a wider scope involves a dangerous

⁶ *Little v. Barreme*, 2 Cranch 170; *United States v. Lee*, 106 U. S. 196; *Virginia Coupon Cases*, 114 U. S. 269; *Belknap v. Schild*, 161 U. S. 10; *United States v. Bevans*, Fed. Cas. No. 14,589.

⁷ *The Charming Betsy*, 2 Cranch 64; *Maley v. Shattuck*, 3 Cranch 458.

⁸ 189 U. S. 453, 465.

extension of the conceptions of sovereignty in a government of delegated and limited powers. In the *Paquete Habana* case, the theory of ratification was invoked for a beneficent purpose — to subject the government to liability, and not to exonerate the individual officers who had overstepped the legal limits of their powers — so that the statement quoted was purely *dictum*.

Moreover, the cases upon which it was based, with the single exception of *Buron v. Denman*, already discussed, fell far short of establishing so broad a rule. One⁹ was a case of seizure of “enemy property” during the Civil War, an act of war for which the individual military officer was properly held not to be personally liable. Another¹⁰ really went upon the ground that the British East India Company, in its governmental capacity, like one of the States of the Union, was not subject to the jurisdiction of the ordinary courts. In a third¹¹ the principle was resorted to in order to make the government liable, not to relieve any individual. And in the last¹² the only rule established was that an individual could make himself liable by ratification for the tortious act of another acting ostensibly as his servant, but without actual employment as such. The facts in the case were simply that a volunteer driver of a coal wagon, not employed by the owner of the business, but apparently seeking a little air and exercise on his own account, negligently broke a window in the course of his operations; and the owner of the business, having accepted the result of his services, and rendered a bill to his customer for the coal so delivered, was held to have become the driver’s employer *nunc pro tunc* by ratification, and to be liable for the broken window. It seems rather a far cry from this grimy incident to the “Act of State” doctrine, and the delicate problems of international law.

The next and latest appearance of the doctrine was in the litigation which arose over the American Military Governor’s abolition

⁹ *Lamar v. Browne*, 92 U. S. 187.

¹⁰ *Secretary of State in Council of India v. Kamachee Boye Sahaba*, 13 Moo. P. C. 22.

¹¹ *Wiggins v. United States*, 3 Ct. Cl. 412.

¹² *Dempsey v. Chambers*, 154 Mass. 330.

of the O'Reilly Slaughter House Franchise in Cuba. There it was successfully invoked to exonerate the officer without imposing any liability on the government. This case is sufficiently remarkable and interesting to warrant a somewhat detailed discussion, especially as it indicates a tendency in the courts to depart from the wholesome doctrine that in a state of peace any wrongful invasion of private rights by a government officer is at his personal peril.

The situation in Cuba at the time was anomalous, and one which would naturally give rise to numerous difficult questions of international law. The war was over, and with it had departed the unfettered sovereignty of war power. Cuba was under the control of the United States, but the government had expressly disclaimed the intention of exercising any jurisdiction or sovereignty except to preserve order and provide administrative machinery until the Cuban people could set up their own independent government and become one of the nations of the earth. Meanwhile Cuba was, as it were, a minor under guardianship — a separate entity, but not a self-directing one.

There existed in Havana at the time an ancient concession or franchise known as the *derecho de puñalada*, the "slaughter house tax," which belonged to the O'Reilly family. It had formerly been annexed to the inheritable and alienable office of *Alguacil Mayor*, or High Sheriff, of Havana. The office itself had been abolished in 1878, but the concession remained in existence until it should be condemned by the government and paid for. It consisted of the right to conduct the public slaughter house, which belonged to the municipality, and receive a certain fee for each head of cattle there slaughtered. This concession was property under Spanish law and as such apparently came within the protection of the Treaty of Paris.

One of the questions which arose in the subsequent litigation was whether this property right survived the withdrawal of Spanish sovereignty, and the Supreme Court rested its decision against the claimant in part upon the proposition that it did not, as well as upon the theory that the abolition of the concession was adopted by the government as an "Act of State" for which the officer who declared

the abolition was not personally liable. This view of the nature of the property rights involved seems so at variance with the general principles of international law, and the usage of the United States in such matters, that for the purposes of this discussion we may assume the view of the lower court, that the concession was property. It is hard to see why a franchise to conduct a slaughter house should not be recognized as property fully as much as a concession to lay cables or to pave streets, or to provide gas or water or transportation; or to collect tolls for the use of a lock, as in *Monongahela Navigation Co. v. United States*; ¹³ or why it should not receive as much protection as the rights of the Sultan of Jolo in his slaves. The fact that at one time it was annexed to a public office is hardly an adequate ground of distinction, when the office had been abolished many years before, and only the concession remained. To go into this phase of the case, however, would extend this discussion into quite another field, certain aspects of which have already been elaborately treated in this Journal from a somewhat different standpoint.¹⁴

Whether or not the O'Reilly concession was property, it was certainly an existing producer of income, and when the American authorities were engaged in putting the finances of the City of Havana upon a sounder basis, they saw in it a convenient source of revenue. General Ludlow, acting as Governor of Havana, thereupon made an order abolishing the franchise and vesting the slaughter house privilege in the city, expressly leaving to the owners the right to apply to the courts to determine their right to compensation. This procedure was a somewhat inverted variety of condemnation, but it at least recognized that the owners were entitled to some legal protection. The owners appealed to General Brooke, acting as Governor of the Island. He made an order simply abolishing the long previously abolished office of *Alguacil Mayor* with all its "rights, duties and privileges," and denying all rights asserted by the claimants. This was subsequently approved by the War Department. It was claimed by the government that it was also included in the general ratifica-

¹³ 148 U. S. 312.

¹⁴ See "Purchasable Offices in Ceded Territory," by Percy Bordwell in the January, 1909, issue of the JOURNAL (Vol. 3, p. 119).

tion by Congress of all the "acts of the United States in Cuba," contained in the so-called "Platt Amendment."¹⁵

A Spanish subject, Doña Maria Francisca O'Reilly de Camara, Countess of Buena Vista, the owner of a one-half interest in the concession, then brought suit in the United States District Court against General Brooke, under a provision giving jurisdiction "of all suits brought by any alien for a tort 'only' in violation of the law of nations or of a treaty of the United States."¹⁶ This statute was apparently designed to cover just such a case, since such a tort could hardly be committed except by a government officer, acting under color of office. The opportunity can scarcely arise for private individuals to violate either the law of nations or a treaty. Upon demurrer the complaint was sustained,¹⁷ and the court held

that officers of the United States are personally liable for torts in violation of law, although done in good faith and in supposed obedience to acts of Congress or the orders of superior officers,

thus following the unbroken course of decision from *Little v. Barreme* to *Belknap v. Schild*. An elaborate and convincing opinion was delivered by Judge Holt, who made it very clear, both upon principle and precedent, that plaintiff's franchise was property under Spanish law, that it survived the withdrawal of Spanish sovereignty, that as property it was protected by the general principles of international law and the special provisions of the Treaty of Paris against spoliation by the officers of the United States Government, and that, whatever the obligations of the government, its officers were liable for any trespass upon such property rights. An answer was then interposed, setting up as a defense the supposed ratification of General Brooke's order by the United States; in other words, pleading in effect that the order complained of had been adopted as an "Act of State," although not describing it by that particular expression. The defense was conducted by the Department of Justice of the United States, and not by any personal attorney for the defendant. The case was tried before the same judge, who sustained such defense and held that

¹⁵ 31 U. S. Stat. 897.

¹⁶ U. S. Rev. Stat., § 563, subd. 16.

¹⁷ 135 Fed. Rep. 384.

if the United States Government had originally authorized and directed Gen. Brooke to issue the order, * * * the United States Government, and *not Gen. Brooke*, would have been responsible to the plaintiff, and that subsequent ratification was equivalent to original authority.¹⁸ It does not appear how this application of the "Act of State" doctrine can be reconciled with the rule of all the former cases that the invasion of private rights by a government officer in time of peace could not be justified "even by authority of the United States."¹⁹ The court recognized that the Constitution might interfere with the spoliation of a citizen by such governmental action, but held that there could be no doubt "as to the effect of such action upon a claim held by an alien," a distinction at variance with the more liberal doctrine of such cases as *Yick Wo v. Hopkins*,²⁰ that an alien's property is no more subject to confiscation than a citizen's.

The case came before the United States Supreme Court on writ of error, and it was held, by Mr. Justice Holmes,²¹ that

it is impossible for the courts to declare an act a tort of that kind [i. e., in violation of the law of nations or of a treaty of the United States] when the Executive, Congress and the treaty-making power all have adopted the act.

This is certainly a surprising declaration and adoption of the "Act of State" doctrine, going almost to the point of holding that "the government can do no wrong" through its officers or otherwise, at any rate to an alien. So far as Executive or Congressional authorization is concerned, such a doctrine seems so clearly contrary to the whole former current of decision that it is almost inconceivable that so radical a departure could have been intended. Doubtless the supposed ratification by "the treaty-making power" was the ultimate ground of the decision. But what was this supposed ratification? It was contained in the treaty of May 22d, 1903, between the United States and Cuba, the new-born entity, not in existence as a government at the time of the treaty with Spain upon which the claimant relied. It merely provided that

¹⁸ 142 Fed. Rep. 858.

¹⁹ *Belknap v. Schild*, *supra*.

²⁰ 118 U. S. 356.

²¹ 209 U. S. 45; see this JOURNAL, Vol. 2, p. 684.

all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all *lawful rights* acquired thereunder shall be maintained and protected.²²

It seems a strained construction of this perfectly proper general provision for the ratification of all "acts of the United States," to read into it an adoption of a specific act of a military governor, approved by an Executive Department, which was attacked on the very ground that it was not an "act of the United States," but the individual tort of the officer in question. But even if the treaty with Cuba had contained an express ratification of this particular act, why should this have any further effect than to debar Cuba and its citizens from thereafter questioning it? The claimant was a Spanish subject; the treaty between the United States and Spain guaranteed all "rights which by law belong to the peaceful possession of property of all kinds of private individuals of whatever nationality such individuals shall be," and provided that the United States, in their occupation of Cuba, should assume the obligations resulting under international law for the protection of life and property. It is hard to see how any subsequent waiver or admission by Cuba, whatever its effect on Cuban citizens, could alter or impair the obligations thus assumed by the United States towards Spain and the subjects of Spain.

Mr. Justice Holmes again referred to his decision in Massachusetts in *Dempsey v. Chambers*, *supra*, but, as already pointed out, in that case ratification doubled the plaintiff's remedy, while in the Brooke case it took away the only remedy the plaintiff had.

Shorn of all disguise of legal phraseology, the act of General Brooke, in abolishing the Countess of Buena Vista's slaughter-house franchise, was an "act of war," just as much as the act of Commander Denman in burning Buron's slave barracoons, and unless it could be justified as an act of war, it was clearly a violation of international law, for which the civil redress wisely provided by the federal statutes should have been afforded. The abolition of a franchise for the purpose of transferring its revenue to a municipality scarcely seems to come within any recognized category of acts of war, especially when done in a time of complete peace, and by an

officer acting in a purely civil capacity, although holding military rank and styled a "Military Governor." Even the stars of a Major-General have no such magic effect.

The government contended in the litigation that General Brooke's order showed on its face "that what he was doing was organizing the institutions of the Island and its municipalities — making them *democratic and up to date*." Possibly some such idea was the underlying source of the court's decision, although unavowed and probably not fully recognized by the court itself. In the Denman case the English court presumably felt constrained to uphold the British commander as a crusader against slavery; in the Brooke case our court may in like manner have felt impelled to exonerate the American governor as an apostle of democracy.

In Mr. Bordwell's recent article in this Journal he took the view that the office of *Alguacil Mayor* had not been in terms abolished by the Spanish Government and so continued in existence under the American occupation, since it was municipal and administrative and not political; that it was the office rather than the franchise which constituted plaintiff's property, and that the new government had a right to abolish it, but could exercise this right only upon payment of compensation. This theory, however, would tend to exonerate General Brooke from individual liability, and remit the claimant to a very uncertain remedy solely against the government, since the abolition of an office is much more within the legitimate scope of governmental powers than the confiscation of a franchise or concession. Moreover, upon the pleadings and the findings of the trial court, which passed upon the legal effect of the Spanish decrees involved, the record in the Supreme Court showed that the "office," as such, ceased to exist in 1878, and only the concession or emoluments attached to it remained in existence at the time the Spanish sovereignty withdrew. Mr. Bordwell's able and interesting argument as to the distinction between administrative and political offices therefore would not have been germane to the case when it came before the Supreme Court, nor would it apparently have been helpful to the plaintiff's claim as against General Brooke at any stage of the case.

The occasions for invoking the "Act of State" doctrine will prob-

ably be few, but they will doubtless arise from time to time. In fact, within a very few years after the erection of the Cuban Government, the United States were again called upon to intervene, occupy, and restore order. Whenever such an occupation takes place, not as a hostile military invasion, but as a form of civil administration, many questions must arise as to the limitations upon the authority of the foreign officers. Is such an officer, as suggested with apparent horror by Lord Mansfield in *Mostyn v. Fabrigas*,²³ "accountable only to God, and his own conscience" — "a monstrous proposition" — or is he bound to keep within the law at his own personal peril, as held by Chief Justice Marshall? The apparent recognition by the Brooke case of the "Act of State" doctrine tends to substitute the rule of might for the rule of law, and so greatly multiplies the possibilities of international offense.

Unquestionably the task of such an officer is a hard one, and where he acts with reasonable judgment and good faith, his government should certainly protect him against personal loss. This government did so in the case of the officer who was held liable in *Little v. Barreme*, and in many other instances. But this should be done by indemnification of the officer and not spoliation of the claimant. The circuitry of such a course is more apparent than real. The government conducts the defense and Congress makes an appropriation to cover the judgment, just as it would for a judgment of the Court of Claims.

There is another possible solution of the difficulty which would really be very simple, although on account of its departure from precedent it might meet with considerable opposition. At present the jurisdiction of the Court of Claims is so limited as to exclude cases "sounding in tort." But the border line between tort and contract is somewhat vague, and the distinction, especially when implied contracts are considered, is largely artificial. It is indisputable that government officers, acting in good faith in the line of their duty, and with no motive of personal advantage, may and sometimes do trespass upon the rights of individuals. It savors of a somewhat narrow legalism to provide that, unless something in the

²³ 1 Cowp. 161.

nature of a contractual obligation can be spelled out of the transaction, the person aggrieved has no remedy against the government. Especially is this true if the "Act of State" doctrine is to be adopted in all its implications, thus taking away the remedy against the officer. The very rule that the state can not be sued except with its own consent is, in its essence, a relic of somewhat obsolescent conceptions of sovereignty.

There is no substantial difference between admitting an enforceable liability upon an implied contract, and upon a technical tort, and one claim can be as fairly and properly litigated as the other. Where a governmental act violates any fundamental law, the government should be willing to litigate the question directly and to make compensation for any private injury so occasioned.

If the jurisdiction of the Court of Claims should be so extended as to include claims by aliens and citizens alike for all injuries suffered through the official acts of government officers, all the requirements of international law in this respect would be amply fulfilled. A resort to the "Act of State" doctrine would then be an honorable assumption of governmental responsibility and not a loophole for escape from pecuniary obligation.

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